CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 170.

MASON CITY AND FORT DODGE RAILROAD COMPANY

vs.

C. D. BOYNTON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 21, 1905.

(20,021.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 23, 1906.

1 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1905.

No. 2172.

MASON CITY & FORT DODGE RAILROAD COMPANY, Plaintiff in Error,
v.
C. D. BOYNTON, Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

The United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, Missouri, on the 8th day of December, A. D. 1905, certifies that the record on file in the above entitled cause, which is pending in such court upon a writ of error duly issued to review a judgment rendered in such cause in favor of the defendant in error in the Circuit Court of the United States for the Southern District of Iowa, discloses the following:

The Code of Iowa, 1897, in a chapter relating to the taking of private property for works of internal improvement, including the construction and repair of railways, contains the following:

"SEC. 1999. If the owner of any real estate necessary to be taken for either of the purposes mentioned in this chapter refuses to grant the right of way or other necessary interest in said real estate required for such purposes, or if the owner and the corporation cannot agree upon the compensation to be paid for the same, the sheriff of the county in which such real estate may be situated shall, upon written application of either party, appoint six freeholders of said county not interested in the same or a like question, who shall

2 inspect said real estate, and assess the damages which said owner will sustain by the appropriation of his land for the use of said corporation, and make report in writing to the sheriff of said county; and, if the corporation shall, at any time before it enters upon said real estate for the purpose of constructing said railway, pay to the sheriff, for the use of the owner, the sum so assessed and returned to him as aforesaid, it may construct and maintain its railway over and across such premises."

"SEC. 2009. Either party may appeal from such assessment to the District Court within thirty days after the assessment is made, by giving the adverse party, or, if such party is the corporation, its agent or attorney, and the sheriff notice in writing that such appeal has been taken. The sheriff shall thereupon file a certified copy of so much of the appraisement as applies to the part appealed from, and said court shall try the same as in an action by ordinary proceedings. The land owner shall be plaintiff and the corporation defendant."

"SEC. 2010. An appeal shall not delay the prosecution of work upon said railway, if said corporation pays or deposits with the sheriff the amount assessed. The sheriff shall not pay such deposit over to the person entitled thereto after the service of notice of appeal, but shall retain the same until the determination thereof. * * *"

"SEC. 2011. On the trial of the appeal no judgment shall be rendered except for costs. The amount of damages shall be ascertained and entered of record, and if no money has been paid or deposited with the sheriff, the corporation shall pay the amount so ascertained, or deposit the same with the sheriff before entering upon the premises. Should the corporation decline to take the property and pay the damages awarded on final determination of the appeal, then it shall pay, in addition to the costs and damages actually suffered by the land owner, a reasonable attorney's fees, to be taxed by the court."

"SEC. 2012. If, on the trial of the appeal, the damages awarded by the commissioners are increased, the corporation shall pay or deposit with the sheriff the whole amount of damages awarded before entering on, or using or controlling the premises. The sheriff, upon being furnished with a certified copy of the assessment may remove said corporation, and all persons acting for or under it, from said premises, unless the amount of the assessment is forthwith paid or deposited with him."

"SEC. 2013. If the amount awarded by the commissioners is decreased on the trial of the appeal, the reduced amount only shall be paid the land owners."

Section 3497 of the Code of Iowa, 1897, also provides:

"An action may be brought against any railroad corporation, * * * in any county through which such road or line passes or is operated."

3 The Mason City and Fort Dodge Railroad Company, plaintiff in error, hereinafter called railroad company, was a railroad corporation organized and existing under the laws of the State of Iowa, and as such entitled to avail itself of the provisions of the foregoing statutes of Iowa. C. D. Boynton, defendant in error, hereinafter called the owner, was the owner of certain lots of ground in the Town of Carroll, Carroll County, in the State of Iowa, and was at all times mentioned herein a citizen of the State of Missouri. Prior to February 18, 1902, the railroad company, requiring Boynton's lots as a right of way for the construction of its railroad, filed an application in the office of the sheriff of Carroll County, asking for the appointment of six freeholders to inspect the lots and assess the damages which the owner would sustain by the appropriation of his lots for the use of the railroad company. On February 18, 1902, the commissioners were duly appointed by the sheriff and made their report, assessing the owner's damages occasioned by the appropriation of his lots by the railroad company at $4750.00.

On the same day the railroad company paid the sheriff that amount of money for the use of the owner.

Afterwards, and within the time fixed by the State statute, the owner appealed from the commissioners' award to the District court of Carroll County. In due time, the owner filed in the last mentioned court a petition for the removal of the cause into the Circuit Court of the United States for the Western Division of the Southern District of Iowa, on the ground of diversity in citizenship. In his petition and bond to secure such removal the owner referred to and

treated himself as the defendant, and referred to and treated the railroad company as the plaintiff, in the case.

In due course the cause came on for hearing in the Circuit Court, when the parties, by a written stipulation filed with the clerk,
4 waived a jury and agreed to try the case to the court. Both parties introduced evidence and fully submitted themselves to the jurisdiction of the court (if they could do so). The trial resulted in an assessment of the owner's damages at $11.445, and in a judgment against the railroad company for costs, including a fee of $300 for the owner's attorneys. In due time the railroad company regularly sued out a writ of error to the end that the record and proceedings in the Circuit Court might be reviewed by this court. The assignment of errors which accompanied the petition for the writ of error alleged that the circuit court erred in ascertaining and fixing the amount of damages to be paid by the railroad company for its appropriation of the owner's lots, in that there was an entire absence of evidence to support the award and finding. At no time during the pendency of the proceedings in the Circuit Court did the railroad company question the jurisdiction of that court or the right of the owner to remove the cause into that court, but both parties participated in the trial up to a final judgment, and in the proceeding to secure a writ of error, as if there was no question of jurisdiction in the case. Not until the railroad company filed its brief in this court was the jurisdiction of the Circuit Court in any manner challenged. But in its brief, as also in the oral argument made in its behalf, the chief point relied upon by the railroad company to secure a reversal of the finding and judgment of the Circuit Court, is that the owner was the plaintiff in said cause and proceeding, and did not have the right to remove the same into the circuit court and that therefore that court could not entertain jurisdiction thereof.

5 And the Circuit Court of Appeals for the Eighth Circuit further certifies that the following questions of law are presented in this cause, that their decision is indispensable to a decision of the cause, and that to the end that such court may properly decide the issues of law so presented it desires the instruction of the Supreme Court of the United States upon such questions, to wit:

1. Was the land owner a defendant, within the meaning of the removal statute, when the suit was removed into the Circuit Court?

2. If the land owner was not a defendant, within the meaning of the removal statute, could the Circuit Court take cognizance of the suit through a removal by him? Stated in other words, the question is this: Is the provision of the removal statute, to the effect that the removal, on the ground of diverse citizenship, may be "by the defendant or defendants therein, being non-residents of that State," restrictive and jurisdictional in the sense that cognizance of the suit can be taken by the Circuit Court through a removal only when it is by the defendant, or is the provision only modal and formal in the sense that non-compliance therewith, or non-conformity thereto, may be waived?

3. Is the judicial proceeding which the land owner is authorized by the statutes of Iowa to initiate in the District Court of the State, by way of a so-called appeal from the assessment of the commis-

sioners selected by the sheriff, a suit which can be originally instituted in the Circuit Court of the United States, when the citizenship of the parties and the sum or value of the matter in dispute are such as to make the suit otherwise cognizable in that court?

6 4. If the Circuit Court could not have taken cognizance of the suit through the removal by the land owner, and if the Circuit Court could have taken cognizance of the suit through its original institution in that court after the assessment by the commissioners, did the parties by appearing in the Circuit Court and there litigating to a final conclusion the matter in dispute, without any objection to the jurisdiction of the court or to the manner in which its jurisdiction was invoked, authorize the Circuit Court to exercise jurisdiction and to proceed to final judgment in like manner and with like effect as if the suit had been originally instituted in that court, the citizenship of the parties and the sum or value of the matter in dispute being such as to make the suit otherwise cognizable in that court?

WILLIS VAN DEVANTER,
WILLIAM C. HOOK,
ELMER B. ADAMS,
Judges of the United States Circuit Court of Appeals for the Eighth Circuit.

Filed Dec. 8, 1905.
JOHN D. JORDAN, *Clerk.*

7 United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing certificate in the case of Mason City & Fort Dodge Railroad Company, Plaintiff in Error, *v.* C. D. Boynton, No. 2172, December Term, 1905, was duly filed and entered of record in my office by order of said Court, and as directed by said Court, the said certificate is by me transmitted to the Supreme Court of the United States for its action thereon.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, this eighth day of December, A. D. 1905.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

8 [Endorsed:] U. S. Circuit Court of Appeals, Eighth Circuit. December Term, 1905. No. 2172. Mason City and Fort Dodge Railroad Company, Plaintiff in Error, *vs.* C. D. Boynton. Certificate of Questions to Supreme Court of the United States.

Endorsed on cover: File No. 20,021. U. S. circuit court appeals, 8th circuit. Term No. 170. Mason City & Fort Dodge Railroad Company *vs.* C. D. Boynton. (Certificate.) Filed December 21st, 1905. File No. 20,021.